

MINUTES OF THE OPEN SESSION

OF THE RHODE ISLAND ETHICS COMMISSION

February 15, 2005

The Rhode Island Ethics Commission held its 4th meeting of 2005 at 9:00 a.m. at the Rhode Island Ethics Commission Conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, February 15th 2005, pursuant to the notice published at the Commission Headquarters and on the State House Library.

The following Commissioners were present:

James Lynch, Sr., Chair James C. Segovis

Patricia M. Moran, Vice Chair* Frederick K. Butler

George E. Weavill, Jr., Secretary Barbara R. Binder

Richard E. Kirby* Ross E. Cheit

James V. Murray

Also present were Kathleen Managhan, Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Jason M. Gramitt, Commission Education Coordinator; Staff Attorneys Dianne L. Leyden and Macall Robertson, and Commission Investigators Steven T. Cross, Peter J. Mancini, and Michael Douglas.

At approximately 9:02 a.m., the Chair opened the meeting. The first

order of business was to approve the minutes of the Open Session held on February 7, 2005. Upon motion made by George E. Weavill, Jr. and duly seconded by James C. Segovis, it was unanimously

VOTED: To approve the minutes of the Open Session held on February 7, 2005.

ABSTENTIONS: James V. Murray and Frederick K. Bulter.

At 9:03 a.m., upon motion made by George E. Weavill, Jr. and duly seconded by Frederick K. Butler, it was unanimously:

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (a)(4), for the discussion of investigative proceedings regarding allegations of misconduct and/or the discussion of litigation, and approval of minutes relating to such discussions, to wit:

a.) Motion to approve minutes of Executive Session held on February 7, 2005.

b.) In re: John A. Celona,
Complaint No. 2004-8

At 9:13 a.m. the Commission returned to Open Session and the Chair reported on actions taken therein. The next order of business was a

motion to seal the minutes of the Executive Session held on February 15, 2005. There was no motion made.

The next order of business was that of advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of Edward F. Yazbak, a North Smithfield Town Council member. In response to Chair Lynch, Mr. Yazback informed that it would cost thousands of dollars to get a full-blown appraisal. He indicated that the project would impact the whole town, especially property in the Village area. He advised that he does not have any plans to sell his property. He stated that he does not see how his participation would result in a direct gain to himself, but he would abide by the Commission's decision. Commissioner Weavill agreed with the staff's recommendation, but indicated that if the issue were revisited he would have additional questions regarding how the project would impact tenants in the petitioner's commercial property. In response to Chair Lynch, Mr. Yazback stated that there are 5 Council members, 2 of whom own property situated further away from the project site than his property. Upon motion made by George E. Weavill, Jr. and duly seconded by James C. Segovis, it was

VOTED: To issue an advisory opinion, attached hereto, to Edward F. Yazbak, a North Smithfield Town Council member.

RECUSAL: Richard E. Kirby.

The next advisory opinion was that of David Balasco, a former Legislative Director for the Governor of the State of Rhode Island. Mr. Balasco was present along with his attorney, Robert Goldberg, Esq. Ms. Leyden advised that, at the last meeting, the Commission directed the staff to review the language of section 5(e) to determine whether it would prohibit his appearance before just the Governor's Office or the entire executive branch. She informed that, based on the clear statutory language and past advisory opinions, the prohibition would only apply to the "state agency" by which he had been employed, the Governor's Office. She explained that the staff resubmitted its original draft because it could not justify an expansion or different interpretation of 5(e)'s prohibition based on the statutory language and the definition of "state agency." She noted that the petitioner's prior duties mirror those of the petitioner in A.O. 2003-56, a former employee of the Lieutenant Governor's Office. There, the Commission unanimously voted to prohibit that petitioner from appearing before the Lieutenant Governor's Office alone.

Ms. Leyden further noted that in 2002 Clarke Curtis came before the Commission holding the same position as Mr. Balasco. His advisory opinion, presented on January 22, 2002, did not issue due to a 4-1 vote. She explained that the executive branch is not specifically included in the definition of "state agency" and the Commission must apply the plain meaning of the statute where it is clear on its face. In

response to Commissioner Cheit, she stated that she does not mean to imply that advisory opinion precedent does not matter. She clarified that one first must look to the plain meaning of the statute and then look to prior advisory opinions regarding the Commission's interpretation. She explained that here the statutory language is clear and the Commission has previously opined that the prohibition does not run to the entire executive branch. Commissioner Cheit voiced his disagreement with the plain meaning argument and inquired how she would reconcile another past opinion in which the Commission did not permit such conduct. Ms. Leyden distinguished the earlier opinion, where the petitioner had exercised a supervisory role over positions in other state agencies.

In response to Commissioner Segovis, Mr. Balasco informed that he was the Governor's Legislative Director, not his Policy Director. He explained that he worked with various state agencies on legislation they were presenting, but did not supervise the departments. Commissioner Segovis noted that in this administration the Governor has strong input regarding legislation. Attorney Goldberg advised that the Governor's Legislative Office and Policy Office are two distinct offices. Commissioner Segovis suggested that Mr. Balasco would have had input regarding legislation. Attorney Goldberg reiterated that another employee in another office dealt with policy matters. In response to Commissioner Cheit, Attorney Goldberg stated that he was not representing that the petitioner never had any substantive input regarding policy. Mr. Balasco related that the

Governor made sure he had a clear understanding of his position regarding legislation and he would make it known to the agencies. In response to Commissioner Binder, he indicated that he was involved in the drafting process.

In response to Chair Lynch, Mr. Balasco stated that he always acted at the Governor's direction, although he was given some discretion in order to get the job done. In response to Commissioner Kirby, he advised that there are a dozen or so departments within the executive branch. He explained that he would review legislation to make sure it was consistent with the Governor's philosophy and, if it were, he would help shepherd it through. In response to Commissioner Weavill, he stated that the agencies would present a packet of materials to the Legislative Office and the Governor would have the final say on whether or not the bill would be introduced. Mr. Balasco would go back and talk to the department directors or their liaisons. Commissioner Weavill questioned whether the petitioner was contacted by the agencies prior to the proposed legislation being reduced to paper. Mr. Balasco indicated that was more of the Policy Director's role and no one came to him prior to there being an actual bill.

In response to Commissioner Weavill, Mr. Balasco stated that he had conversations with department directors and legislative aides regarding different bills. He further explained that he would discuss strategies on the bills, such as what might need to be added to a bill.

Attorney Goldberg clarified that the petitioner is not asking to lobby the Governor's Office, Policy Office or Legislative Office. He advised that the executive branch is comprised of many state agencies. Upon motion made by Frederick K. Butler and duly seconded by Richard E. Kirby, it was

VOTED: To issue an advisory opinion, attached hereto, to David Balasco, a former Legislative Director for the Governor of the State of Rhode Island.

AYES: Frederick K. Bulter, Richard E. Kirby, James V. Murray, Barbara R. Binder and Patricia M. Moran.

NOES: George E. Weavill, Jr., James C. Segovis, Ross E. Cheit and James Lynch, Sr.

Chair Lynch suggested that the Commission needs to review portions of section 5(e).

The next advisory opinion was that of Barbara A. Barrow, Esq., a Middletown Town Councilor. Commissioner Kirby opined that the Commission could not prohibit the partners in the petitioner's small law firm from appearing before other town boards because the partners are not public officials. Ms. Leyden indicated that he is correct, but noted that she had some problems with certain aspects of the request, particularly where it is a small firm. She explained that

the Code would not apply to proscribe the partners' conduct, where the petitioner has made no representation that she is sharing in the firm's profit or volume. Commissioner Segovis inquired about what is an associate of a law firm. Ms. Leyden replied that generally an associate is hired by a firm to do certain work, is paid a salary and does not share in the firm's profits. Commissioner Cheit noted that her salary is still tied to the firm. Ms. Leyden agreed, but stated that she would be paid a set salary regardless of whether the firm had 2,000 cases or no cases.

Commissioner Cheit observed that the petitioner's yearly salary could increase due to the firm's success. Ms. Leyden stated that the Commission must deal with the present facts. Commissioner Binder inquired about any year end bonuses and Commissioner Cheit suggested that they would need more information. Commissioner Kirby again stated that the Commission does not have jurisdiction over the firm's partners, but suggested that there should be some kind of control. Commissioner Moran stated that they should not try to speculate on what may happen to her salary next year. She indicated that she must make her decision based upon the facts presented, and if those facts change an avenue exists to address it. Commissioner Cheit asked if the petitioner being an equity partner would be the only situation in which the firm could be prohibited from appearing. Ms. Leyden replied that it would be an easy call if she were a partner but, by definition, an associate of the firm does not reap the benefits of the whole firm. In further response, she

acknowledged that there could be additional situations that would change the scope of the opinion, such as where the petitioner receive a bonus as a share in the year's end business.

Commissioner Kirby stated that the petitioner is not a decision-maker at the firm. If she were to tell her partners that they may not appear, but they do so, her only recourse is to recuse. He stated that, although he is not entirely comfortable with the opinion, he questions what the Commission can do to prevent non-public officials from appearing. Commissioner Butler agreed and indicated that the partners could do what they want since they are outside the Code's jurisdiction. He stated he would be more comfortable with an opinion not addressing what the partners can or cannot do. Commissioner Weavill asked what would happen if the petitioner were an equity partner. Commissioner Kirby noted that she would then have authority within the firm and could resign from the partnership if the other partners insisted on appearing. He suggested that, otherwise, as an employee of the firm she would be forced to quit if her bosses insisted on taking the action. Commissioner Murray stated that they need more information on her compensation structure, particularly as to any sharing in the percentage of the work she brings in or any bonuses. Commissioner Kirby opined that she would be a business associate of the firm where it is so small in size.

Commissioner Segovis also suggested that more information is needed. Chair Lynch inquired if that was the consensus.

Commissioner Butler expressed that he is not sure he wants more information and asked why they would need to rule on persons not subject to the Code. He suggested refining the draft opinion. Commissioner Segovis replied that, if Commissioner Murray's concerns are accurate, a business association exists between the petitioner and her firm and her firm may not appear. Chair Lynch advised that it would be unfair not to issue her an opinion, but the Commission collectively believes it does not have enough information. He suggested suspending the decision until further information is obtained. Commissioner Kirby indicated that the burden should be on the petitioner to present additional facts.

Upon motion made by George E. Weavill, Jr. and duly seconded by James C. Segovis, there was further discussion. Legal Counsel informed that she also is hearing a question as to whether the Commission can issue direction to non-petitioning individuals such as the partners. Mr. Gramitt clarified that there is no question that the petitioner is a business associate of Updegrove & Gontarz. The only issue is whether the Commission would deem her to be a partner. He indicated that if she were a partner, under agency law the Commission would attribute Attorney Gontarz's appearance before the probate court to her. Commissioner Kirby commented that as an employee who does not control her employer she would have to resign either her job or her public office. Upon the motion, it was unanimously

VOTED: To refer the draft opinion back to the staff to obtain additional information regarding the petitioner's compensation.

***Commissioner Cheit left the meeting at approximately 10:15 a.m.**

The next order of business was Discussion of Proposed Regulatory Actions, including review of final drafts of the proposed gift regulation. Mr. Gramitt reported that the Senate recently introduced a bill to amend the gift regulation, prohibiting state and municipal elected and appointed officials from accepting gifts over \$25. He reviewed draft Options #2 and #4, which both prohibit gifts of cash. He clarified that, while Option #4 applies to whatever the gift may be (cash, goods, food, services, etc.), #2 is not as broad in its carve-out.

He noted that the food exception only relates to where the official speaks as part of an official program. He explained that the "of insignificant value" exception only applies to services and informational materials.

In response to Commissioner Butler, Mr. Gramitt stated that receiving a baseball cap would violate Option #2, but not #4. Commissioner Segovis inquired if the Chair wished to broaden Option #2, to which he replied that he did not. Commissioner Butler inquired what would happen if a mayor received something from a sister city. Mr. Gramitt indicated that the sister city may not be an interested person, in which case it would be allowed. Also, one must determine if the gift

is to the official, individually, or to the city government. Commissioner Moran questioned about an attorney offering to give his time, worth \$200, as services to assist an official under #2. Commissioner Binder noted that it would be allowable to assist the performance of his official duties under section (b). Mr. Gramitt suggested that the provision of a free legal opinion on the constitutionality of legislation would be excepted. Commissioner Butler inquired if the receipt of services of insignificant value exception in #2 would be unlimited. Mr. Gramitt informed that it would be given that there is no aggregate imposed. Commissioner Butler stated his preference for #4, noting that someone could give a public official a taxi ride to work every day, worth less than \$20 each ride. Chair Lynch stated that the receipt of a cab ride every day would not be insignificant.

*Commissioner Moran and Kirby briefly leave and return to the meeting.

Ms. D'Arezzo provided the Commission with an overview of the requirements for rule making under the APA. She informed that any procedural challenge must be made within 2 years. She opined that the Commission must notice the actual language on which it will be taking public comment and voting. She explained that at the last gift hearings, the Commission amended the noticed aggregate amount of \$750 downward to \$450. She expressed her opinion that the APA would require the regulation to be re-noticed if any substantive

change were to be made after taking public comment, including upward or downward departures in the aggregate amounts. She indicated that she consulted with Legal Counsel on the issue and she concurs. In response to Commissioner Weavill, she stated that if they choose to consider a previously unconsidered option presented during testimony they would need to provide 30 days public notice of further hearing on that new option.

Chair Lynch suggested that the Commission notice only 2 options, choosing either \$50 or \$75 as an aggregate. Commissioner Binder agreed and inquired about including an effective date for the regulation. Mr. Gramitt informed that public officials and employees would still be required to report those gifts received from interested persons, if the aggregate totaled \$100 or more, during the portion of calendar year 2005 prior to the new regulation's effective date. He recommended re-inserting the current regulation's language regarding the reporting requirement in the draft options. Chair Lynch and Commissioner Kirby concurred. Upon motion made by Barbara R. Binder and duly seconded by James C. Segovis, it was

VOTED: To change the \$75 aggregate limit in Option #4 to \$50.

AYES: James C. Segovis, Frederick K. Butler, Barbara R. Binder
and James Lynch, Sr.

NOES: George E. Weavill, Jr., Richard E. Kirby, James V. Murray

and Patricia M. Moran.

The motion failed on a 4-4 vote.

Commissioner Segovis related that Commissioner Cheit was in favor of a \$75 aggregate. Chair Lynch indicated the cap would remain at that amount. Legal Counsel inquired whether the Commission wished to consider noticing a third option so it could consider voting on a \$50 aggregate. She stated that, if the Commission were to establish an effective date, it would obviate a donee's argument that he or she did not know when the regulation took effect. Chair Lynch proposed July 1st. In response to Commissioner Binder, Ms. D'Arezzo explained that the regulation would take effect 20 days after filing with the Secretary of State's Office, unless a later date was included in the regulation. Mr. Gramitt advised that the Commission could face a problem if its hearings went beyond that date. Commissioner Segovis cautioned regarding flexibility. Mr. Gramitt stated that he would draft the reporting language, but not include an effective date. Upon motion made by Richard E. Kirby and duly seconded by George E. Weavill, Jr., it was unanimously

VOTED: To have the staff include language regarding the reporting requirements existing under the current regulation.

Commissioner Weavill requested that Legal Counsel review the

reporting requirement language. Ms. D'Arezzo noted that the Commission would need to include specific statutory language in its public notice if the proposed regulation would have an adverse fiscal impact on small businesses or any city or town. Upon motion made by George E. Weavill, Jr. and duly seconded by Richard E. Kirby, it was unanimously

VOTED: That the Commission finds that the draft proposals would have no adverse financial impact on any cities or towns and small businesses.

Mr. Gramitt clarified that the staff would publicly notice the two options as discussed. Ms. D'Arezzo indicated that the public hearing could be held on March 22, 2005 at 9:00a.m.

*Commissioner Moran left the meeting at 11:00 a.m.

Philip West of Common Cause addressed the Commission and indicated that he did not hear support for Option #2. He recommended that they advertise options including aggregates of \$50 and \$75. Chair Lynch noted that they already voted to proceed on the two proposals and stated that there is some opinion among the members as to #2. Mr. Gramitt also reported on a proposed amendment to Regulation 1023 to correct erroneous citations. Upon motion made by James C. Segovis and duly seconded by Richard E. Kirby, it was unanimously

VOTED: To notice a proposed amendment to Regulation 1023 for public hearing to correct a scrivener's error.

The next order of business was discussion of a proposed agenda item regarding public comment. Legal Counsel informed that she provided a memorandum to all members regarding statutory requirements for meeting notices and agenda items. She advised that they could, by majority vote, add non-noticed items to the agenda for informational purposes only. She urged them to be cautious and refrain from voting on any items discussed under the line item of new business. She noted that the Commission operates under statutory parameters and stated that decisions regarding how much non-Commission participation should be permitted must bear that in mind. Chair Lynch expressed his view that they should retain the status quo, adding that he feared opening Pandora's box. He advised that the public does have the opportunity to address the Commission via fax, letter and telephone. He suggested that they would be ill advised to open up the floor to public comment.

Commissioner Segovis echoed the Chair's concern, adding that the Commission never seems to have enough time and allowing for a public comment period could encumber them. Commissioner Kirby informed that he suggested the public comment period in light of discussion regarding the new business line item. He acknowledged that they could not discuss ongoing complaints, adjudications or

investigations. He stated that if others believe it would create a problem, he would be OK with their decision. Legal Counsel advised that, pursuant to the Commission's quasi-judicial function, they could not entertain comment on advisory opinions or complaints. Commissioner Weavill urged the members to keep it as it is and let the Chair decide whether or not public comment would be germane. Commissioner Murray agreed.

The next order of business was the Director's Report. Mr. Willever reported that there are 14 complaints pending, 6 of which are non-filing complaints. He indicated that the staff recently settled 15 non-filing matters. He advised that there are 27 advisory opinion requests pending and requests for education are rising. In response to Commissioner Weavill, he stated that the Swain matter, which is 3 years old, is the oldest case. Chair Lynch complimented the new legal staff and reported that he has received positive feedback regarding Mr. Gramitt's recent seminars.

The next order of business was new business. There being none, at 11:14 a.m., upon motion made by Richard E. Kirby and duly seconded by George E. Weavill, Jr., it was unanimously

VOTED: To adjourn the meeting.

Respectfully submitted,

George E. Weavill, Jr.